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Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use

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1. Introduction

These days the use of pre-trial detention in Europe seems to be ever increasing. This is in spite of the fact that the the presumption of innocence tells authorities to be restrictive in pre-detaining suspects. It also seems contrary to the starting point of the European Court of Human Rights. Basing itself on the presumption of innocence the Court holds that a suspect should await his trial in freedom. For obvious reasons, the presumption of innocence and the European case-law are often invoked to either state that today's pre-trial detention practices are in violation of both presumption and case-law or to say that pre-trial detention practice should take them more into account. In this article I am concerned with the question whether the presumption of innocence and the case-law of the European Court really make an argument against all too enthusiastic use of pre-trial detention. I will answer that question in the negative. For that I will firstly discuss the claimed pre-trial detention increase in paragraph 2. Secondly, in the third paragraph, I will elaborate on the meaning of the presumption of innocence and I will argue that the presumption cannot be invoked to effectively curtail the use of pre-trial detention. Paragraph 4 then discusses the case-law of article 5 of the European Convention

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on Human Rights. I will stipulate that the European Court in the elaboration of its afore mentioned basic assumption is not able or willing to restrict the general tendency of increasing pre-trial detention. In the fifth paragraph I will conclude my argument and I will pose some questions for the future as well.

2. Pre-Trial Detention Practice in Today's Risk Society

The most striking examples of pre-trial detention being used in a rather unrestricted way may be found in recent measures regarding the detention of suspected terrorists: Guantanamo Bay being the ultimate example. However, many European countries, to a certain extent have also relaxed the rules on pre-trial detention for reasons of preventing further terrorist harm.¹ But even leaving terrorism aside, research shows that existing requirements on the use of pre-trial detention are easily met. Dutch judges indicate that it is relatively easy to meet the grounds on which pre-trial detention can be based. "If you are skilful, you can virtually detain anyone", one interviewed judge pointed out.² Similarly, extensive interpretation of grounds for pre-trial detention seems to be present in German pre-trial detention decisions.³ Also, English research on bail practice has shown that magistrates are generally happy to follow the Crown Prosecution Service's view.⁴

This apparent lenient interpretation of the rules that govern pre-trial detention should be expected to show in the figures. Indeed, English figures indicate that in England the number of defendants remanded in custody is rising.⁵ With regard to the Netherlands increase in the use of pre-trial detention has been subjectively experienced by legal practitioners for many years and can be seen objectively in the figures as well. For example, recent Dutch research has established that since 1995 the use of pre-trial detention in the Netherlands has doubled in terms of

¹ See, amongst others, Article 67 paragraph 4 of The Dutch Code of Criminal Procedure that loosens the degree of suspicion necessary for the first period of pre-trial detention for terrorist crimes. See for example also the Press release of 25 July 2008 by the United Nations Human Rights Committee regarding Final Conclusions and Recommendations on Reports of the United Kingdom, France, San Marino and Ireland: www.unhchr.ch/huricane/hurricane.nsf/NewsRoom?OpenFrameSet.

² F. van der Heide *et al.* (eds.), *Strafrechter en strafketen: de gang van zaken* (1995-2006), 59.

³ P. Albrecht, "Die Untersuchungshaft – ein Straf- oder Schuldspruch? Ein Plädoyer für den Grundsatz der Unschuldvermutung im Haftrecht", in A. Donatsch *et al.* (eds.), *Strafrecht, Strafprozessrecht und Menschenrechte, Festschrift für Stefan Trechsel zum 65. Geburtstag* (Zürich, 2002), 362.

⁴ S. Jones, "Guilty until Proved Innocent? The Diminished Status of Suspects at the Point of Remand and as Unconvicted Prisoners", *Common Law World Review* 32 (2003), 404.

⁵ S. Jones, "Guilty until Proved Innocent? The Diminished Status of Suspects at the Point of Remand and as Unconvicted Prisoners", *Common Law World Review* 32 (2003), 404.

percentage.⁶ Furthermore, with regard to several European countries, the Council of Europe's annual penal statistics reveal that pre-trial detainees continue to make up an important part of the total prison population and that the mean rates of untried prisoners are tending to go up rather than to go down.⁷

Obviously, further and more in depth research should be conducted but for now it is by no means irresponsible to assume that the facts and figures on pre-trial detention can be connected to the concept of the risk society. The relaxation of the rules, the relaxed interpretation of the rules and the additional figures indicate that pre-trial detention is increasingly used in an easier and assumably preventive and risk controlling way. Not only harsher sentencing and increased use of imprisonment are features of the culture of control.⁸ Pre-detaining suspects has become part of the state's strategy of managing risk as well.⁹

3. The Limited Restricting Abilities of the Presumption of Innocence on Pre-Trial Detention

To detain a suspect is to deprive him from his liberty without having a judge establish his guilt within a fair trial. A pre-trial detainee may turn out to be innocent in the end. Therefore, when pre-trial detention is perceived to be applied too easily, too often or too long, it is alleged that pre-trial detention practice should be more in keeping with the presumption of innocence.¹⁰ The presumption requires that

⁶ See research by the Dutch Council of the Judiciary, F. van der Heide *et al.*, *loc. cit.*, p. 24.

⁷ See the World Pre-trial/Remand Imprisonment List 2008, download from <www.kcl.ac.uk/depsta/law/research/icps/publications.php>. See also the Council of Europe's SPACE I reports on <www.coe.int/t/e/legal_affairs/legal_co-operation/Prisons_and_alternatives/>. See also S. Deltenre and E. Maes, "Pre-Trial Detention and the Overcrowding of Prisons in Belgium", *European Journal of Crime, Criminal Law and Criminal Justice* 12 (2004), 348–370.

⁸ See with regard to the United States and the United Kingdom D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Oxford, 2001). Concerning several European Countries see N. Lacey, *The Prisoners' Dilemma. Political Economy and Punishment in Contemporary Democracies* (Cambridge, 2007).

With regard to the Netherlands see H. Boutellier, *De veiligheidsutopie: hedendaags onbehagen en verlangen rond misdaad en straf* (Den Haag, 2005). See also M.J. Borgers, *De vlucht naar voren* (Den Haag, 2007), 8–12. Concerning Ireland see L. Campbell, "The Culture of Control in Ireland: Theorising Recent Developments in Criminal Justice", *Web Journal of Current Legal Issues* 1 (2008), <www.webjcli.ncl.ac.uk/2008/issue1/campbell1.html>.

⁹ See also P. Albrecht, *loc. cit.*, pp. 362–366; Liz Cambell, "Reconfiguring the Pre-trial and Trial Processes in Ireland in the Fight against Organised Crime", *International Journal of Evidence and Proof* 12 (2008), 232.

¹⁰ See for example P. Albrecht, *loc. cit.*, pp. 355–372; P. LeRoy, "The Reign of the Queen of Hearts: the Declining Significance of the Presumption of Innocence", *Cleveland State Law Review* (1989)

the state treats a suspect as if he were innocent. Evidently, this is not a factual but a normative assumption. It is, according to Ashworth, a moral and political principle, based on a widely shared conception of how a free society should exercise the power to punish. The state has far-reaching powers to investigate, prosecute, try and punish. In a democratic society it is expected that these powers should be exercised with respect for the autonomy and dignity of each individual.¹¹ The presumption of innocence thus protects the individual against arbitrary and excessive state action.¹² Thus, when a suspect is deprived of his liberty there must be good reason to do so. Furthermore, the presumption contains the concept that – even though pre-trial detention inevitably holds a punitive element – pre-trial detention should not be aimed at or amount to an actual punishment.¹³

Ashworth also points out that the presumption of innocence is a potential boundary for all too easy use of remand practices in general, and to recent British anti-terrorist control-orders restricting a person's right to liberty in particular.¹⁴ This line of thinking is furthermore found in various European legal instruments. In its Green paper on "mutual recognition of non-custodial pre-trial supervision measures", aimed at reducing excessive use and length of pre-trial detention the European Commission, particular reference is made to strengthening the presumption of innocence.¹⁵ Likewise and with the same purpose, the committee of ministers of the Council of Europe stresses the presumption's fundamental importance in its Recommendation on the use of remand in custody.¹⁶ The presumption of innocence is thus widely assumed to curtail the imposition of pre-trial detention.

393-416; S. Jones, *loc. cit.*, pp. 399-417, S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford, 2005), 180.

¹¹ A. Ashworth, "Four Threats to the Presumption of Innocence", *International Journal of Evidence and Proof* 10 (2006), 249. See also R. Kitai, "Presuming Innocence", *Oklahoma Law Review* 55 (2000), 280-284.

¹² See also N. Keijzer, "Enkele opmerkingen omtrent de praesumptio innocentiae in strafzaken", in Ch.J. Enschedé *et al.* (eds.), *Naar eer en geweten* (Arnhem, 1987), 245-246.

¹³ M.S. Groenhuijsen, "De nabije toekomst van de voorlopige hechtenis, in het bijzonder in het licht van de onschuldpresumptie", in J. de Hullu and W.E.C.A. Valkenburg (eds.), *Door Straatsburg geïnspireerde grondnormen voor het Nederlandse strafproces* (Deventer, 2000), 95.

¹⁴ A. Ashworth and M. Redmayne, *op. cit.*, in particular pp. 234-235, A. Ashworth, *loc. cit.*, pp. 275-276.

¹⁵ Commission of the European Communities, *Green paper on mutual recognition of non-custodial pre-trial supervision measures*, Brussels 2004 COM(2004)562 def., p. 3, and the annex SEC(2004) 1046, pp. 17-18.

¹⁶ Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Rec(2006)13.

But where then, does the presumption draw the line? Which criteria regarding the use of pre-trial detention can be derived from the presumption of innocence and how strict should they be interpreted? Is the current extensive use of pre-trial detention practice violating the presumption of innocence?

The European documents do not give an answer to those questions. In literature different approaches can be found. Keijzer en Groenhuijsen consider the presumption of innocence to represent a certain weight in matters concerning the use of means of coercion such as pre-trial detention. When legislation is drafted but also when a judicial decision to detain a suspect is taken, the presumption of innocence is weighed against other principles and interests and in so doing a certain line is drawn.¹⁷ The standard of reasonable suspicion is an example of such a line. In the same way Groenhuijsen finds the pre-trial detention grounds of risk of flight, collusion, repetition and public disorder to be in accordance with the presumption of innocence.¹⁸ He infers that procedural goals, as well as the purpose of giving a proper social reaction to an offence, the latter to which risk of repetition and public disorder contribute, both justify the tension with the presumption of innocence.¹⁹ It is not surprising that Groenhuijsen thus basically finds a confirmation of the presumption in the existing (Dutch)²⁰ legal system of pre-trial detention.²¹

Some authors such as Llobet Rodriquez, Albrecht, and Den Hartog however, criticize the grounds of risk of repetition and/or risk of public disorder. It is asserted that in order to respect the presumption of innocence pre-trial detention should only be allowed for reasons that serve purposes of the procedure itself. Risk of repetition and risk of public disorder only serve general criminal interests, not the procedure itself. Consequently, pre-trial detention based on these grounds is considered to be too punitive and therefore in violation of the presumption

¹⁷⁾ M.S. Groenhuijsen, *loc cit.*, pp. 95-96; N. Keijzer, *loc. cit.*, p. 246.

¹⁸⁾ See M.S. Groenhuijsen, *loc. cit.*, pp. 95-97.

¹⁹⁾ Groenhuijsen actually refers to the Dutch ground of the “seriously rocked legal order”. A rocked legal order and a public disorder are theoretically not one and the same but in practice both grounds seem to a large extent to be connected to the gravity of the offence. The European Court, as will be discussed later, also considers them as equivalents.

²⁰⁾ Since the Dutch grounds for pre-trial detention can in essence be found in most criminal procedures – they are also in more or less the same terms defined by the United Nations – Groenhuijsen’s opinion would apply to more than only the Dutch system.

²¹⁾ See P.H. van Kempen and F. Kristen, “Plicht tot toepassen van alternatieven voor voorarrest”, *NJCM-bulletin* 2005, in particular pp. 1155-1156, and P.H.P.H.M.C. van Kempen and F.G.H. Kristen, “Alternatieven voor voorarrest vanuit Europees perspectief”, in A.H.E.C. Jordaans, P.A.M. Mevis and J. Wöretshofer (eds.), *Praktisch strafrecht* (Nijmegen, 2005), 319.

of innocence.²² These authors ascribe therefore an absolute restriction to the presumption and argue that existing pre-trial detention systems that accept these grounds – which are many systems – are violating it. In a way the same seems to be done by Ashworth when he interprets public disorder in a restrictive manner. He understands the ground as serving the interest of the suspect who committed a serious crime and has to be locked up for his own protection.²³ Within this meaning, public disorder does not so much serve general criminal interest but more so the individual interest of the suspect and equally procedure itself.

More examples of different approaches could be given. But the point is that literature seems to be utterly divided on the standards that can be deduced from the presumption of innocence curtailing pre-trial detention. Moreover, the European institutions fail to give any standards. Literature shows that existing rules can be either confirmed or rejected by the presumption. Many arguments – and to my opinion none of them compelling – are balanced in many different ways by many different scholars. To me this indicates that the presumption of innocence can be seen as an important but abstract principle operating in the background. It is relevant in the sense that it constantly reminds us that we are dealing with a possible innocent individual and that a possibility of error in accusing this person exists. Its function is to stress that state action should not be arbitrary and that the right to liberty should be taken into account and.²⁴ It gives weight as such to the right to liberty but what weight exactly or what the outcome should be of balancing the individual right against public interests, it does not tell.²⁵ For this

²²) See with regard to risk of repetition as well as public disorder :J. Llobet Rodríguez, *Die Unschuldvermutung und die materiellen Voraussetzungen der Untersuchungshaft. Ein Beitrag zur Strafprozessreform in Lateinamerika* (Freiburg, 1995), 134-150 (recidivism), pp. 122-128 (public disorder) and P. Albrecht, *loc. cit.* pp. 357-358 and 368. It must however be noted that Albrecht does acknowledge the possibility of pre-trial detention on preventive grounds in Polizeirecht. See on public disorder J.D. den Hartog, “De onschuldpresumptie: grenzen aan de gronden waarop de voorlopige hechtenis mag worden bevolen”, in J.L.M. Boek *et al.* (eds.), *Grensoverschrijdend strafrecht* (Arnhem, 1990), 137.

²³) A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford, 2005), 213.

²⁴) Countries such as communist China and the (just ex-) communist Soviet Union, that valued the public interest over the individual interest and that relied on the state's objectivity and infallibility not surprisingly were suspicious of the presumption of innocence or even denied its existence. See G.V. Thieme, “The Debate on the Presumption of Innocence in the People's Republic of China”, *Review of Socialist Law* 10 (1984), 277-290; compare also T.A. Gelatt, “The Peoples Republic of China and the Presumption of Innocence”, *The Journal of Criminal Law and Criminology* 73 (1982), 259-316. With regard to the Soviet Union see J. Quigley, “The Soviet Conception of the Presumption of Innocence”, *Santa Clara Law Review* 29 (1989), 301-330.

²⁵) See also P.H.P.H.M.C. van Kempen and F.G.H. Kristen, *loc. cit.*, pp. 317-320. See also P.J. Schwikard, *Presumption of Innocence* (Kenwyn, 1999), 35-39. Because of the lack of practical utility of the presumption of innocence in the sense of a policy consideration and thus the danger of

depends on the way individual rights and public interests are valued at a certain moment in a certain society. The presumption of innocence is thus a principle that has little *operational* value with regard to pre-trial detention when trying to improve or criticize it. Therefore, I am of the opinion that the presumption of innocence itself cannot be used as an effective argument against the ever increasing use of pre-trial detention as discerned in nowadays practice.

4. The Article 5 Case-Law of the European Court of Human Rights

4.1. *Introduction*

Article 5 of the European Convention on Human Rights protects the individual right to liberty. Pre-trial detention is – within limitations – acknowledged as a legitimate exception to the right to liberty. Further rules and restrictions on the legitimacy of the exception are developed in the case-law of the European Court. Interestingly, in its case-law the Court positions the presumption of innocence at the centre of its evaluative framework. In view of my earlier argument regarding the inability of the presumption of innocence to set specific restrictions I will therefore also look into the question whether the Court attaches specific restrictive criteria to the presumption. But most important, I will scrutinize the Court's case-law in order to see where the Court has drawn the lines and to what extent the case-law may provide an argument against today's "preventive" and "easy" use of pre-trial detention.

4.2. *General (Strict) Principles and Standards*

To reach an understanding of the Court's case-law on pre-trial detention the first thing to do is discern the general principles that were set out by the Court. Every single decision on pre-trial detention by the ECHR contains an explanation of the principles that were established over the years. For this the Court uses the following standard formula:²⁶

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence,

vagueness, Schwikkard even restricts the definition of the presumption. In her opinion it is only a rule regulating the burden of proof.

²⁶ See also A. Ashworth and M. Redmayne, *op. cit.*, p. 208 and P. van Dijk and Y. Arai, *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 493-497.

a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release.²⁷

It is clear that the right to liberty and the presumption of innocence are put forward as the fundamental starting point for pre-trial decisions. Yet, the Court does not subsequently and explicitly connect the presumption of innocence with specific restricting criteria. This fits the assumption that the presumption is rather a general idea against arbitrary state actions than a principle setting specific standards itself.²⁸ However, the Court has set various standards in its case-law that reflect the general idea of the presumption, i.e. the thought that pre-trial detention should be used carefully. Some of these standards are rather concrete, others are more open standards.

First, the Court stresses that the persistence of a reasonable suspicion is a *conditio sine qua non* for the validity of the continued detention. After a certain lapse of time however, the suspicion no longer suffices and the detention must in addition be based on “relevant and sufficient” grounds. This open standard has been made slightly more specific by categorising four accepted reasons (or public interests) for pre-trial detention. In the *Smirnova case* the Court distinguishes: the risk that the accuse will fail to appear for trial, the risk that the accused would take action to prejudice the administration of justice, the risk that the accused will commit further offences and finally, the risk that the release of the accused will cause public disorder.²⁹ When applying these grounds stereotypical reasoning is not allowed: each case needs to be assessed individually.³⁰ Besides the condition of relevant and sufficient foundation of the pre-trial detention the Court demands the national authorities to display “special diligence” in the conduct of the proceedings. Furthermore, the national courts have an obligation to consider alternative measures when deciding whether a person should be released or detained. The Court reasons that the public interest may just as well be served by placing the suspect under police surveillance or releasing him on bail.³¹

²⁷) ECHR 27 November 1991, appl. no. 12718/87 (*Clooth v. Belgium*), para. 36, ECHR 27 November 1991 appl. no. 12325/86 and 14992/89 (*Kemmache v. France*), para. 45, ECHR 6 April, 2000, appl. no. 26772/95 (*Labita v. Italy*), paras. 152–153.

²⁸) P.H.P.H.M.C. van Kempen and F.G.H. Kristen, *loc. cit.*, p. 319.

²⁹) ECHR 24 July 2003, appl. no. 46133/99 and 48183/99 (*Smirnova v. Russia*), para. 59.

³⁰) ECHR 8 June 1995, appl. no. 16419/90 and 16426/90 (*Yagci & Sargin v. Turkey*), para. 52, ECHR 4 October 2005, appl. no. 3456/05 (*Sarban v. Moldova*), para. 101.

³¹) ECHR 23 June 2005, *Latasiewicz v. Poland*, para. 59, ECHR 20 January 2004, *G.K v. Poland*, para. 85; ECHR 21 December 2000, *Jabłoński v. Poland*, para. 83. ECHR 27 June 1968, *Neumeister v. Austria*, paras. 3–4.

Thus, looking at the Court's reasoning above the importance of the right to liberty is firmly stressed, the public interests on which pre-trial detention may be based are restricted, and national authorities are urged to conscientiously motivate their decisions and to look for alternatives. To put it briefly, these general standards strongly create the impression that pre-trial detention should be used very reluctantly.

4.3. "Length" and "Diligence" Watering Downt the Requirement of Reasoned Pre-Trial Detention

The essence of the Court's standards contains that there must be good reasons for detaining a suspect. "Sufficient and relevant grounds" is, however, an open norm the application of which depends on the way the Court interprets it in a given case. The restricting potential of this requirement is already watered down by the phrasing of the standard reasoning itself. It focuses on the *reasonable length* of the pre-trial detention. The grounds provided for by the national authorities therefore are not examined for their tenability as such but are always looked at from the duration perspective. Furthermore, reasonable length is a relative matter. The cases in which the Court establishes a violation of Article 5 paragraph 3 of the Convention vary in length from 18 months to five years pre-trial detention. The same time span occurs in cases in which the Court declares the complaint in-admissible. Complaining about a few months is not something the Court will reward quickly though. In for example the case of *Hendriks v. the Netherlands* the Court almost seems to issue a type of warning when stating that Hendrik's pre-trial detention of almost 6 months had been *significantly* shorter than the cases in which a violation was found (*Letellier* and *Smirnova* indeed were about periods of almost three years and four years pre-trial detention respectively).³² Also, the Court refers to a period of 18 months pre-trial detention as "not very significant".³³ In the case of *Hengl v. Austria* the Commission at the time did not even look into the merits of a case of three months detention on suspicion of various fraud offences and merely stated that the reasonable length had not been exceeded.³⁴

Moreover, the focus on reasonable length puts into perspective the requirement of considering alternative measures. Looking at the reasoning in the decisions *Jabłoński v. Poland* and *Czarnecki v. Poland*, one would think this concerns a firm

³²⁾ ECHR 5 July 2007, appl. no. 43701/04 (*Hendriks v. the Netherlands*). Also see the reasoning in ECHR 23 January 2007, 1427/03 (*Prokopyshyn v. Poland*) in which case there was a pre-trial detention of approximately five months.

³³⁾ ECHR 10 January 2006, appl. no. 34090/96 (*W.B. v. Poland*), para. 66.

³⁴⁾ ECHR 1 December 1993, appl. no. 20178/92 (*Hengl v. Austria*).

requirement for every situation in which a decision on pre-trial detention has to be made.³⁵ However, Jabłoński en Czarnecki concerned pre-trial detention of three years and nine months, and five years respectively. In most other cases in which the Court points out the need of considering alternative measures, the detention period is considerable.³⁶ Furthermore, it needs to be noticed that the court in many cases does *not* point out the (non-compliance of the) obligation of considering alternative measures. This indicates the alternative obligation similarly being highly dependent on the specific features of the case.³⁷

Duration of pre-trial detention is relevant in another way as well. To substantiate an initial period of pre-trial detention a reasonable suspicion will suffice. The reach of such a period is not clear but in any case a period of nine weeks has been accepted by the Court.³⁸ Besides this initial period, it seems the Court recognises another “first period”. This period is about the time necessary to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused.³⁹ In *Guz v. Poland* – Guz was detained on several counts including suspicion of aggravated assault and handling stolen goods – the Court accepted an initial “research” period for a time span of eight months.⁴⁰ The relation between both mentioned initial periods is not very distinct. Clear though, is the fact that the requirement of the substantiation of the pre-trial detention by the national authorities is more or less left undone for this initial period of research and administration. The Court, in a way, accepts relevant and sufficient grounds for such a period while the mentioned

³⁵ ECHR 21 December 2000, appl. no. 33492/96 (*Jabłoński v. Poland*), ECHR 28 July 2005, appl. no. 75112/01 (*Czarnecki v. Poland*).

³⁶ See for example ECHR 26 April 2005, appl. no. 49929/99 (*Chodecki v. Poland*) (three years and eleven months of pre-trial detention), ECHR 26 January 2007, appl. no. 44115/98 (*Wedler v. Poland*) (three years pre-trial detention), ECHR 26 July 2001, appl. no. 34097/96 (*Kreps v. Poland*) (four years and three months). Cases with shorter periods are at hand as well. One year and a half in ECHR 15 February 2005, appl. no. 55939/00 (*Sulaoja v. Estonia*), or even nine months in ECHR 6 November 2007, appl. no. 30779/04 (*Patsuria v. Georgia*). These periods should however also be seen in the light of all the various circumstances of the cases concerned. Such as the situation that national legislation contains an irrefutable presumption of risk of flight and to what extent the suspect is taken seriously in his nearly infinite protests against his detention. See also para. 5 hereafter.

³⁷ One could think of the circumstances mentioned in the preceding footnote but equally of the situation in which a risk of flight – that is easiest controlled by an alternative security – is the only ground brought forward.

³⁸ ECHR 20 March 2001, appl. 33591/96 (*Bouchet v. France*), para. 41.

³⁹ ECHR 26 September 2006, appl. no. 29293/02 (*Guz v. Poland*).

⁴⁰ ECHR 26 September 2006, appl. no. 29293/02 (*Guz v. Poland*). The “nature of the offence” influencing such a period will be dealt with in the next paragraph.

reasons as terminating the investigation, etc. are not specifically connected to these grounds.⁴¹

As put forward in paragraph 4.2, the examination of reasonable length is not limited to the existence of relevant and sufficient grounds but also includes the question whether the national authorities displayed special diligence in the conduct of the proceedings. This means it is for the authorities to bring the case to a verdict swiftly and carefully. Both requirements – “substantiation” and “special diligence” – are presented by the court as two different matters. After ascertaining relevant and sufficient reasons the diligence still has to be scrutinised. However as mentioned already, this assessment works the other way around too. In case of a relatively short pre-trial detention, which period was efficiently used for investigation and trial, the Court accepts this research period as sufficient ground for a reasonable detention without controlling the grounds put forward by the authorities. Special diligence is therefore not just an assessment supplementary to the grounds but also affects the way the grounds are evaluated. This intertwining of the diligence assessment and the assessment of the grounds likewise comes forward in the cases with a remarkably long detention for which the Court establishes insufficient grounds *and* a lack of proper conduct.⁴² Another indication is found in the fact that for both checks it is relevant whether or not the pre-trial detention was subject to judicial control regularly.⁴³

The explanation above demonstrates that the requirement to specify the reasons on pre-trial detention is not only dependent on the length of the detention but equally on the way the procedure was conducted. This means that the Court allows grounds for pre-trial detention to be interpreted leniently or even allows that pre-trial detention for a certain period does not need very specific grounds. That entails that one of the possible components of the increasing use of pre-trial detention – the lenient judicial interpretation as discussed in paragraph 2 – will not be countered by the standards as developed in the European Court’s case-law. This is, as long as the pre-trial detention does not not take too long. But not too long in the Court’s opinion might still be a year or two.

⁴¹ It needs to be stressed however that in the case of *Guz v. Poland* a danger of flight justified the pre-trial detention after the initial period. It is hard to say whether and to what extent the presence of this ground influenced the acceptance of the initial period.

⁴² When the Court deems the grounds insufficient the diligence normally does not need to be checked anymore. This is nevertheless explicitly done by the Court in cases in which the national authorities seem to have been negligent in all respects. See for example ECHR 28 July 2005, appl. no. 75112/01 (*Czarnecki v. Poland*), para. 44, ECHR 8 November 2005, appl. no. 6847/02 (*Khudoyorov v. Russia*), para. 188.

⁴³ See for example ECHR 23 January 2007, appl. no. 1427/03 (*Prokopyszyn v. Poland*), ECHR 14 September 2000, appl. no. 34447/97 (*Szofer v. Poland*).

4.4. *A Rather Formal Control*

The design of the national legal procedure for pre-trial detention and the way in which it is factually given shape are important factors within the Court's reasoning on pre-trial detention. This too, plays a part in the way the administration of pre-trial detention is assessed. The Court, or previously the Commission, often recognises the fact that the pre-trial detention was subject to regular judicial control.⁴⁴ That control, however, should not just be a formality. When a national court repeatedly may confine to the statement that no grounds exist for letting the suspect go free and the suspect then needs to show there *are* such grounds, this does not amount to effective judicial control but to mandatory pre-trial detention.⁴⁵ Also, to systematically ignore the suspect's arguments in favour of release cannot be said to be effective judicial control. This way of disregarding the suspect's procedural position is usually demonstrated when a suspect has repeatedly asked over a long period of time to be released on bail or under police supervision (as provided by national law).⁴⁶ On the other hand, if a suspect does not invoke his legal rights to argue the (grounds for) pre-trial detention⁴⁷ or if he does not bring up any conclusive arguments against or realistic alternatives for the detention, this might be an argument against his release.⁴⁸ So it seems that the right to an adversarial criminal proceeding – that is a basic assumption within the European Human Right's case-law on Article 6 of the Convention – plays a part within the Article 5 case-law regarding the question whether pre-trial detention was justified. This all makes the human rights check on pre-trial detention formal to a considerable degree. Such a formal check is able to correct procedures in which a prosecution seems to be polically instigated⁴⁹ or procedures in which one could

⁴⁴ See for example ECHR 1 September 1993, appl. no. 19929/92 (*H. Ö. v. Germany*), ECHR 6 March 2007, appl. no. 8036/02 (*Sağat et al. v. Turkey*), ECHR 25 November 2004, appl. no. 4493/04 (*Szofer v. Poland*), ECHR 10 January 2006, appl. no. 34090/96 (*W.B. v. Poland*), ECHR 15 June 2006, appl. no. 39251/98 (*Węgrzyn v. Poland*), ECHR 23 januari 2007, appl. no. 1427/03 (*Prokopyszyn v. Poland*).

⁴⁵ ECHR 26 July 2001, appl. no. 33977/96 (*Ilijkov v. Bulgaria*), paras. 79-85, ECHR 8 April 2004, appl. no. 44062/98 (*Hamanov v. Bulgaria*), para. 70, ECHR 2 February 2006, appl. no. 41211/98 (*Iovchev v. Bulgaria*), paras. 106-110, ECHR 2 March 2006, appl. no. 11886/05 (*Dolgova v. Russia*), paras. 43-46.

⁴⁶ ECHR 4 October 2005, appl. no. 9190/03 (*Becciev v. Moldavia*), para. 62, ECHR 25 October 2007, appl. no. 42940/06 (*Govorushko v. Russia*), para. 49.

⁴⁷ ECHR 15 May 1996, appl. no. 22439/93 (*Weixelbraun v. Austria*).

⁴⁸ ECHR 22 June 1995, appl. no. 19382/92 (*Van der Tang v. Spain*), para. 67.

⁴⁹ ECHR 8 November 2005, appl. no. 6847/02 (*Khudoyorov v. Russia*), ECHR 2 March 2006, appl. no. 11886/05 (*Dolgova v. Russia*), ECHR 6 December 2007, appl. no. 25664/05 (*Lind v. Russia*). Also: ECHR 4 October 2005, appl. no. 3456/05 (*Sarban v. Moldavia*).

doubt the impartiality and independency of the judiciary.⁵⁰ It does however, not put a hold on the increasing use of pre-trial detention in a society that is “merely” averting risks.

4.5. *The European Court on Public Disorder and the Role of the Gravity of the Offence*

Probably the most controversial reason for substantiating pre-trial detention is the ground of public disorder.⁵¹ Its precise meaning has never been really elaborated on but the essence of detaining a suspect for reasons of public disorder lies within the particular seriousness of the offence committed, and the (possible) reaction of society to it. The ground is therefore closely related to the punishment threatening the offence⁵² and to the extent the society disapproves of certain behaviour. Thus, the punitive element that is always present in pre-trial detention is most prominent when the detention is based on public disorder. Referring to the presumption of innocence some therefore advocate that the ground should be strictly defined⁵³ or reluctantly applied,⁵⁴ others find public disorder to be *per se* incompatible with the presumption of innocence (see para. 3).

The European Court accepted public disorder as a ground for pre-trial detention in the *Letellier case* but at the same time underlined that it was only to be used in exceptional circumstances. For example, only in particularly grave offences that give rise to a social disturbance can public disorder “be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused’s release would actually disturb public order”. Relying on just the gravity of the offence will not suffice, the Court points out. In addition, the Court held that detention of this ground will continue to be legitimate only if public order remains actually threatened. Its continuation cannot be used to anticipate a custodial sentence.⁵⁵

⁵⁰ ECHR 25 October 2007, appl. no. 42940/06 (*Govorushko v. Russia*), ECHR 6 December 2007, appl. no. 25664/05 (*Lind v. Russia*).

⁵¹ See F. Duenkel and J. Vagg, “Conclusions”, in *Waiting for Trial* (Freiburg, 1994), 954, See also Rodriquez, *loc. cit.*, p. 123, who even connects the ground with the Nazi regime.

⁵² F. Duenkel and J. Vagg, *loc. cit.*, p. 954.

⁵³ M.S. Groenhuijsen, *loc. cit.*, p. 96 and J. uit Beijerse, *Op verdenking gevangen gezet* (Nijmegen, 1998), 202-203.

⁵⁴ The extensive way in which public disorder is being applied by the Dutch judiciary has brought about many critical reactions. See L. Stevens, “De praktijk van de Nederlandse voorlopige hechtenis vanuit Straatsburgs perspectief: klaag niet te snel”, *Delikt & Delinkwent* (2007), 499-514.

⁵⁵ ECHR 26 June 1991, appl. no. 12369/86 (*Letellier v. France*) para. 51.

This reasoning suggests that there should be *specific indications* of a (*danger* of) social disturbance in the case at hand. For indications one could maybe think of the media attention the case already attracted, public protest, or agitation within a small community that served as crime scene. Nevertheless, several decisions of the European Court demonstrate that the requirement of specifying public disorder is not that strict after all. In two Dutch cases the Court found that a detention of three months for (relatively small scale) drug trafficking and one of six months for rape could be based on the ground that the accused was suspected of an act that “carried a punishment of imprisonment of twelve years or more and the legal order had been seriously rocked by that act”.⁵⁶ The national courts did not further specify or individualise the existence of the “rocked” legal order. And although at first sight disturbing legal order seems an even more abstract concept than disturbing public order, the Court accepts this ground as an equivalent of public disorder and holds it a sufficient foundation for the pre-trial detention. But, without any further specification or substantiation, what else than the gravity of the offence is there to constitute this ground? And if the gravity of the offence is the single factor in constituting public disorder, is it not so that the pre-trial detention in fact amounts to punishment, this being a violation of the presumption of innocence?

It is true that the decisions in the Dutch cases were probably motivated to a large extent by the relatively short periods of pre-trial detention in both situations. The court puts forward that the passage of time will generally weaken the justification of pre-trial detention based on these abstract considerations. Some inadmissibility decisions, however, show periods of three to four years detention being based upon public disorder.⁵⁷ Moreover, in certain cases the Court explains that the gravity of the offence on its own is insufficient for substantiating “public disorder” but at the same time accepts as part of the required extra foundation the fact that the suspicion is about serious and large scale drug crimes.⁵⁸ In the

⁵⁶) ECHR 5 July 2007 (*Kanzi v. the Netherlands*) and ECHR 5 July 2007 (*Hendriks v. the Netherlands*).

⁵⁷) With regard to suspicion of drug trafficking see ECHR 23 May 1999, appl. no. 34033/96 (*Daugy v. France*), ECHR 4 May 2004, appl. no. 64117 (*Guala v. France*), disturbing public order by stealing a criminal file from the Court of Justice, ECHR 4 September 1996, appl. no. 24239/94 (*Tressel v. France*), public order and committing murder by a long career criminal respectively a neighbour, ECHR 9 April 1997, appl. no. 28896/95 (*Abouchiche v. France*) and ECHR 22 October 1997, appl. no. 30475/96 (*Louchart v. France*), and the disturbance of the public order in case of multiple armed bank robberies, ECHR 16 April 1998, appl. no. 33477/96 (*Lahmar v. France*). Note that pre-trial detention in these cases had also been ordered on other grounds such as risk of flight or risk of committing crimes. Their influence on the Court’s decision cannot be excluded.

⁵⁸) ECHR 23 May 1999, appl. no. 34033/96 (*Daugy v. France*), ECHR 4 May 2004, appl. no. 64117/00 (*Guala v. France*).

author's view this substantiation is no more than a relatively general reference to the gravity of the offence. The additionally mentioned circumstances of the harm and crime caused by drug trafficking are in the same way closely related to this general gravity. A similar "gravity of the offence based" argumentation can be found in a case concerning suspicion of organised counterfeiting. The Court deemed public disorder to be present for a period of three years and five months since the suspicion was regarding a crime that violated one of the states most elementary functions, the issuing of money.⁵⁹

Before concluding, it is worth noting that the gravity of the offence may also play a leading part with regard to pre-trial detention for crimes that are deemed to be of a terrorist nature. Naturally, no far-reaching inferences should be made from one or two specific cases. However, it is at least interesting that the Court accepted that due to the usual complexity of investigation in terrorism cases PKK suspects could be held in detention for one year and six months on the mere basis of the serious nature of the offence alone. This offence concerned arson to three cars by throwing a Molotov cocktail.⁶⁰

Thus, it can be asserted that the gravity of the offence can be a very important factor or even a single ground for justifying pre-trial detention. When besides the fact that a serious crime was committed there are no other independent reasons for detaining a suspect one can say that the punitive element of pre-trial detention is very prominent. One could even wonder whether "pre-detaining" has not actually turned into "already punishing". A European Court allowing this use of pre-trial detention is not expected to limit national authorities in their use of pre-trial detention.

5. No Restriction on Pre-Trial Detention by The European Convention and the Presumption of Innocence

Pre-trial detention will always be a worrying aspect of criminal law. Balancing individual liberty and public interest – public security in particular – produces dilemmas.⁶¹ In trying to find a balance, the presumption of innocence is often used to draw a certain line. As pointed out in paragraph 3 the presumption however, is not an effective argument against today's pre-trial detention practice. The same is true about the European Court of Human Rights' case-law on Article 5 of the European Convention. The criteria the Court uses are open – to a large extent

⁵⁹) ECHR 14 December 2004, appl. no. 48217/99 (*Pitalugue v. France*).

⁶⁰) ECHR 6 March 2007, appl. no. 8036/02 (*Sağat et al. v. Turkey*). Similarly ECHR 17 October 2000, appl. no. 29874/96 (*Şahin v. Turkey*).

⁶¹) M.S. Groenhuijsen, *loc. cit.*, pp. 88–89.

procedural – standards that leave room for balancing individual rights against public interests. With that, the Court does allow pre-trial detention to be used more than only reluctantly and even in a rather punitive way. The case-law demonstrates that the Court puts a hold on excessive and arbitrary use of pre-trial detention that results from altogether denying the individual right to liberty. But it also shows that the Court, as a part of (a risk) society, goes along with the demands of society. The Court and its case-law are not able or willing to disapprove or stop the way in which pre-trial detention is used today.

This poses the question what then could be arguments to put a hold to the increasing use of pre-trial detention. But maybe, this is not the right question to ask. Practice and theory are starting to diverge considerably. Also, practice does not seem to be receptive to any arguments put forward by scholars. In the reality of the risk society we may have to accept that pre-trial detention is no longer an *ultimum remedium*. It is on the contrary a popular preventive instrument serving the purpose of security, and hence an intensively used one. Perhaps it would be more realistic and useful to start thinking about a new theoretical framework on pre-trial detention. For that it would first of all be useful to look into various empirical questions such as the decision making of judges and prosecutors regarding pre-trial detention. What are accepted reasons for pre-detaining suspects (and do they indeed fit the theory of the risk society)? Other important questions would concern the relation between pre-trial detention and the final punishment. Is pre-trial detention not actually being used as a punishment? And how do use and length of pre-trial detention influence the actual punishment? Next, in connection with that kind of “reality” research new principles could be developed on how and to what extent the right to liberty could and should be protected given the new reality. That is not an easy task and honesty compels me to say I do not have that many clues yet. However, being realistic seems more fruitful than fighting a losing battle with idealistic but ineffective arguments.